3-29-1976

Paul Collette v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-1105

APPELLEE'S BRIEF

547 SW 2d 457

SUPREME COURT OF KENTUCKY

FILE NO. 75-1105

PAUL COLLETT — APPELLANT

V. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE ROBERT H. HELTON, JR., JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

ROBERT F. STEPHENS
ATTORNEY GENERAL

RAYMOND LARSON
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

CARLOS POPE
COMMONWEALTH'S ATTORNEY
27th Judicial District

COUNSEL FOR APPELLEE

This is to certify that a copy of the foregoing Brief for Appellee has been mailed, first class postage prepaid, to the Honorable Robert H. Helton, Jr., Judge, Laurel Circuit Court, Courthouse, London, Kentucky 40741; Honorable Carlos Pope, Commonwealth's Attorney, Court Square, Barbourville, Kentucky 40906; and Honorable Jack Emory Farley, Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, Counsel for Appellant, on this the 29th day of March, 1976.

Raymond M. Larson
Assistant Attorney General

TABLE OF CONTENTS AND AUTHORITIES

SUPREME COURT OF KENTUCKY

FILE NO. 75-1105

PAUL COLLETT — APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE ROBERT H. HELTON, JR., JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE QUESTION PRESENTED

WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OBTAINED DURING A WARRANTLESS SEARCH OF APPELLANT'S AUTOMOBILE.

COUNTERSTATEMENT OF THE CASE

STATEMENT OF THE NATURE OF THE PROCEEDINGS:

Appellee accepts as substantially correct appellant's statement of the nature of the proceedings in the above captioned matter in paragraphs one and two of page two of his brief. Additional statements as to the nature of the proceedings will be referred to in appellee's brief as necessary.

STATEMENT OF THE RELEVANT FACTS:

At approximately 2:00 A.M. on the morning of October 25, 1975, Kentucky State Police Trooper George Tomlinson (hereinafter referred to as Tomlinson) received a radio communication requesting him to proceed to the Quality Court Motel located near the I-75 Interchange located at North Corbin, Kentucky (Transcript of Evi-

dence p 14, hereinafter referred to as TE). According to Tomlinson one or two subjects were trying to break into the Quality Court Motel (TE p 14).

According to Tomlinson, upon his arrival into the parking lot a person ran out pointing toward Paul Collett (TE p 15). Tomlinson stated that when he first saw Collett the trunk of his automobile was open and that he had his hands down in the trunk of the car, after which he pulled them out and shut the trunk lid (TE p 15).

Tomlinson stated that appellant's automobile was in the parking lot between a filling station and the Quality Court Motel (TE p 8). He stated that appellant was obviously intoxicated (TE p 10) and that he was arrested for being drunk in a public place at approximately 2:30 in the morning (TE p 9).

Tomlinson advised appellant that his car would be impounded and towed to a garage and that it would be necessary for him to inventory his car prior to it being towed in (TE p 10).

Upon inventory of the car, a refrigeration unit of an air conditioner which had been stolen was found in the trunk of the automobile owned by the appellant (TE p 4). Approximately 45 minutes to an hour later appellant was charged with the offense of grand larceny (TE p 9).

Appellant made a pre-trial motion to suppress evidence secured by what he alleges to be an illegal search of his automobile (Transcript of Record, p 7, hereinafter referred to as TR). After a lengthy hearing pursuant to appellant's motion to suppress (TE pp 7-20), the trial court overruled appellant's request to

suppress the evidence of grand larceny (TE p 19). The basis of appellant's appeal is that the trial court committed reversible error when it admitted the evidence obtained during Tomlinson's search of appellant's automobile.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OBTAINED DURING A WARRANTLESS SEARCH OF APPELLANT'S AUTOMOBILE.

Appellant argues only one ground for reversal of his conviction in the trial court below, namely, the trial court erred in admitting evidence of an alleged illegal search. We disagree.

Appellant first argues that there was no evidence that a breaking and entering had occurred, nor that there was probable cause to believe that the appellant had committed such a crime. Appellee submits that the evidence of record refutes appellant's argument.

In the case at hand Trooper Tomlinson stated that he was called to the Quality Court Motel to investigate a breaking and entering at 2:00 A.M. Further, upon his arrival he saw a man, the motel manager, running and pointing to appellant, who was obviously placing something in the trunk of his automobile, after which he slammed the lid of the trunk shut. All of the foregoing evidence occurred at approximately 2:00 to 2:30 in the morning.

The procedure followed in the case at the bar by Trooper Tomlinson followed the procedure which was set out with approval in Terry v. Ohio, 88 S.Ct. 1868 (1968) wherein the Court stated that:

> "...a police officer may in appropriate manner approach a person for purposes of investigating possible criminal behavior ...." See also Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972); Bays v. Commonwealth, Ky., 486 S.W.2d 706 (1972)."

Appellee submits that the foregoing facts alone constitute more than sufficient probable cause upon which a warrantless arrest of the appellant may be properly made.

Appellant stresses the point that he was not placed under arrest for larceny until after Tomlinson had inventoried the automobile, although appellant had been arrested for being drunk in a public place. This Court in Mears v. Commonwealth, Ky., 499 S.W.2d 75 (1973) held:

> "That an arresting officer believes he does not have sufficient grounds for making an arrest does not invalidate the arrest if there actually existed probable cause for making the arrest. See Ballard v. Commonwealth, Ky., 462 S.W.2d 905 (1971)."

As in Mears, supra, appellee submits that in the instant case there was sufficient evidence of record to provide probable cause for arresting appellant, although appellant was arrested on the charge of being drunk in a public place.

We next move to the question of the search of appellant's automobile. Appellee submits that the same facts and circumstances which justified appellant's arrest also provide probable cause for the search of his automobile. In Mears, supra, this Court held as follows:

> "Under the circumstances a search warrant was not essential. See Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777

(1964), where it is said that greater latitude is allowed in the search without a warrant of an automobile than a building because of the mobility of the former. See also Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), where it is pointed out that the rule in Carroll prevails although the officers have the automobile under their control since it is just as much an intrusion to hold the vehicle until the warrant could be obtained as it would be to make an immediate search. In the court's language, 'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.'"

Appellee submits that on the basis of the circumstances as set out above there was more than adequate probable cause to arrest appellant as a result of the investigation of the reported breaking and entering of the Quality Court Motel in spite of his arrest for being drunk in a public place. Such being the facts the subsequent search of appellant's automobile was equally based on probable cause and appellant's arguments to the contrary are without merit.

Appellant relies on the case of City of Danville v. Dawson, Ky., 528 S.W.2d 687 (1975) in support of his position We submit that Dawson, supra, has no application to the case at the bar.

It should be noted that in Dawson, supra, the accused was arrested on the charge of driving while under the influence of intoxication only, and prior to her being stopped for that reason there was absolutely no probable cause to believe that any other crime had been committed. Such being the state of the facts

this Court found any subsequent search of the automobile after Dawson's arrest for "inventory purposes" which revealed contraband was an illegal search and the contraband could not be admitted into evidence.

It should be noted that in the case at the bar based on the facts as recited above that there was probable cause to believe that appellant was in fact involved in the breaking and entering which was the reason for Tomlinson's appearance at the scene in the first place. The presence of probable cause in the case at the bar and the absence thereof in Dawson, supra, clearly distinguishes Dawson from the instant case.

As in Mears, supra, probable cause existed for both the arrest of appellant on the charges for which Trooper Tomlinson was called to investigate and the subsequent search of his automobile. The belief of the officer that he did not have sufficient grounds for making such an arrest and search, when probable cause in fact existed, does not invalidate the arrest and search.

CONCLUSION

For the foregoing reasons appellee submits that the judgment of the Laurel Circuit Court should be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

Raymond M. Larson

RAYMOND LARSON
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE